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No. 88-24
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

Supreme Court, U.S.
E I L E D
SEP 9 1988
JOSEPH E. SPANIOLO, JR.
CLERK

HELEN CAMPO,

Petitioner,

-against-

THE NEW YORK CITY EMPLOYEES'
RETIREMENT SYSTEM, and the CITY OF
NEW YORK,

Respondents.

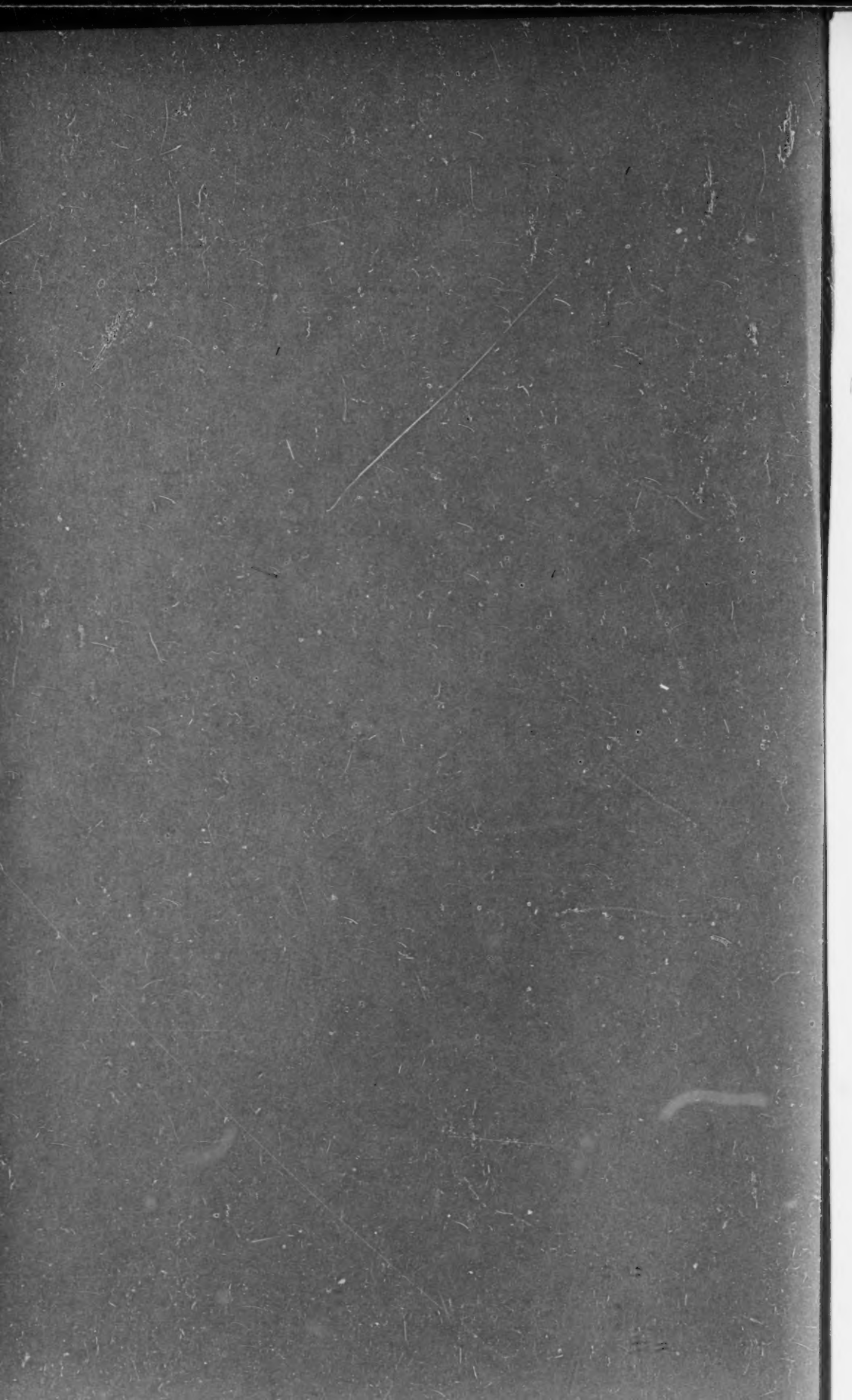
BRIEF IN OPPOSITION TO A
PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

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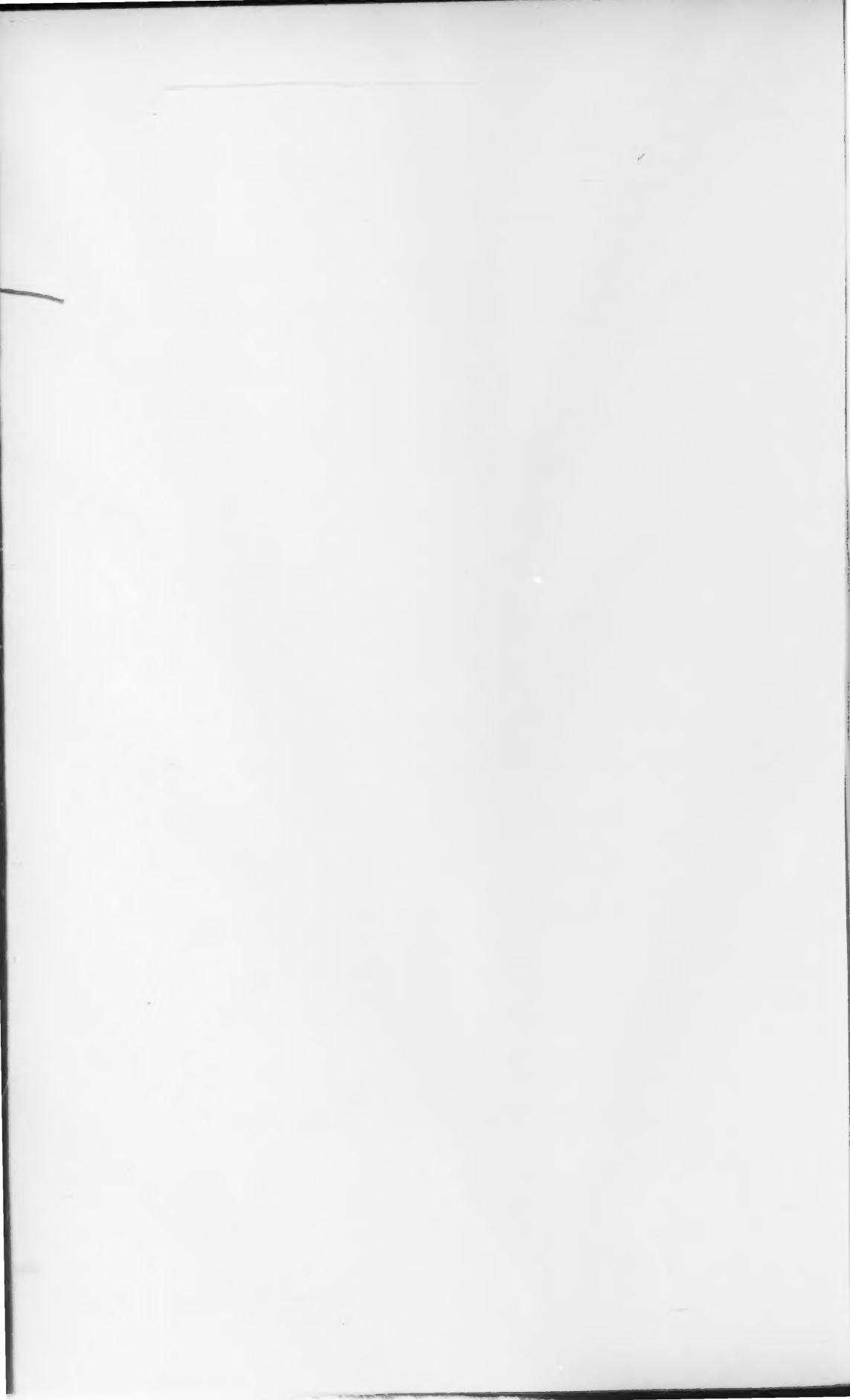
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September 9, 1988.



COUNTER-STATEMENT OF THE
QUESTION PRESENTED

Whether, in light of Parratt v. Taylor, 451 U.S. 527 (1981) and Mathews v. Eldridge, 424 U.S. 319 (1976), petitioner has stated a claim pursuant to 42 U.S.C. §1983 of a violation of procedural due process, where her claim that her deceased husband selected a pension option providing for survivorship benefits, raised shortly after his death but more than three years after he allegedly made such election, was considered and rejected by the respondent pension system on the ground that he had defaulted in making an election and was accordingly paid pursuant to the option providing for the maximum lifetime payments with no survivorship benefits, and where state law provided an



**expeditious summary procedure for the
judicial review of such determination?**



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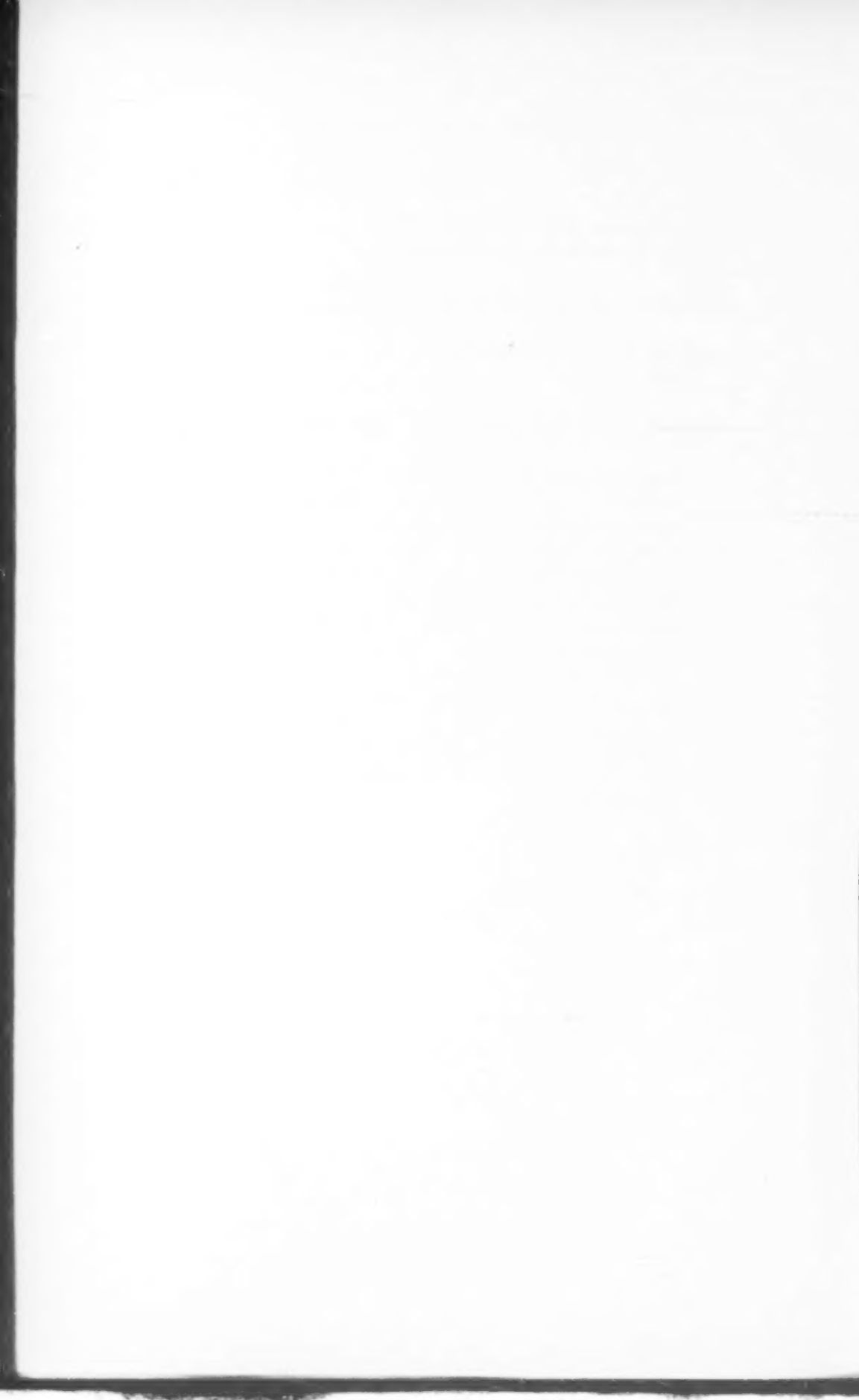


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BRIEF IN OPPOSITION TO A
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COUNTER STATEMENT OF THE CASE

(1)

Justin Campo, petitioner's husband,
retired from New York City's Department of
Sanitation in October 1980 due to a disabling



illness. In December 1980, respondent New York City Employees' Retirement System ("NYCERS") approved its Medical Board's recommendation that he be retired and began to pay him benefits on January, 1981. After receiving benefits for over three years, Mr. Campo died on May 27, 1984 at the age of 53 (CA6, A19).¹ One week later, NYCERS informed petitioner that she would not receive survivor's benefits (CA6).

Petitioner thereafter protested that her husband had selected a retirement option that specifically provided for her to receive survivor's benefits, and on October 4, 1984 NYCERS responded, enclosing a copy of its letter to Mr. Campo, dated March 26, 1981,

¹ References within parentheses preceded by "A" are to the Appendix to the Petition. References preceded by "CA" are to the Joint Appendix in the Court of Appeals.



which set forth the amount of payments under the different option plans (A20). She thereafter visited the office of NYCERS, and was told by its personnel that NYCERS had selected the maximum lifetime payments option for her husband, with no survivorship benefits, upon his failure to select an option; according to the NYCERS employee, a second notice had been sent to her husband on May 5, 1981, warning him that such option would be irrevocably selected for him if he made no election within sixty days (A20-21). Petitioner claims that her husband did not receive this notice (A21).

It is petitioner's position that her husband, in her presence (1) filled out a pension application form sometime between March 16, 1981 and May 11, 1981; (2) selected Option I, which provides for a survivor's benefits; and (3) mailed that form



to NYCERS by certified mail, return receipt requested (A3). She further claims that the return receipt was received by her husband, and that she watched him place it in a desk drawer; however, she has been unable to find that receipt (A3). From these facts, petitioner concluded that NYCERS had "lost" the option selection form (CA8) and that she is entitled to survivorship benefits (CA13). On June 25, 1985, her counsel wrote to NYCERS to appeal its denial of the petitioner's survivor's benefits, and petitioner offered to testify at a hearing (A21). The appeal was denied without a hearing on July 10, 1985 (A22-23, CA9).

(2)

In December, 1985, petitioner commenced this action against NYCERS and the City of New York pursuant to 42 U.S.C. §1983 in the United States District Court for



the Eastern District of New York. By stipulation of the parties, petitioner served an amended complaint in March, 1986, wherein she alleged that NYCERS' denial of survivor's benefits without a hearing deprived her of a property right without due process of law (CA10-11). Petitioner also asserted state claims (CA11-12). Her request for relief sought the payment of survivor's benefits, retroactive to May, 1984, for petitioner's life (CA13). Respondents thereafter moved for dismissal of the complaint pursuant to Rule 12(b) (6) for failure to state a claim upon which relief can be granted, arguing first that petitioner alleged a mere negligent act which did not constitute a cognizable due process claim (CA15, CA23). The respondents further argued that petitioner had not been deprived of due process because adequate state



judicial procedures were available to her (CA23-24). Petitioner, in addition to opposing respondents' motion, cross-moved for sanctions pursuant to Rule 11 (CA16-18, A17).

DECISIONS BELOW

(1)

The District Court (Goettel, J.) did not address the respondents' argument that petitioner's claims are predicated upon negligence in light of petitioner's concession that her suit was not based upon negligence (A23). The Court further assumed, although expressing doubt, that petitioner's claim for survivor's benefits was valid and constituted a sufficient property interest (A24-26, A33). The Court held, however, that petitioner had failed to state a federal claim because respondents had provided her adequate due process of law (A33).



The District Court applied the three-pronged analysis set out by this Court in Matthews v. Eldridge, 424 U.S. 319 (1976). The Court found that her right to survivor's benefits did not necessarily implicate "the very means by which to live" and thus did not require a pre-deprivation hearing, distinguishing Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (A28-29). The Court next determined that NYCERS' procedures, although not involving a "trial-type hearing," resulted in only a minimal risk of an erroneous deprivation and that a hearing would have minimal value since the claim revolves around documentary evidence (A30-31). Finally, the Court found that the burden of subjecting the respondents to a hearing whenever a retiree or surviving relative was dissatisfied with his or her benefits would work a crushing



responsibility upon respondents and would result in the delay rather than expedition of retirement claims (A31). Rather, petitioner had adequate judicial remedies under state law, including a summary proceeding pursuant to Article 78 of New York's Civil Practice Law and Rules, to challenge respondent's failure to pay the claimed benefits (A31-32).

(2)

The Court of Appeals for the Second Circuit affirmed, holding that because a state judicial hearing was available to petitioner upon timely demand, procedural due process requirements had been satisfied (A7). For this purpose, the Court of Appeals, like the District Court, assumed but did not decide that petitioner asserted a property interest protected by procedural due process (A6).



The Court, in analyzing petitioner's due process claim, relied upon this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986), wherein this Court held that state tort remedies available to the plaintiff for the loss of his hobby kit by prison officials provided him sufficient procedural due process (A7-8). The Court of Appeals noted that in the Second Circuit, the holding of Parratt had been applied to non-tort actions, and that New York provided a judicial mechanism for the review of state administrative determinations through the vehicle of a summary proceeding pursuant to Article 78 of New York's Civil Practice Law and Rules (A8-10).

The Court stated that, as in Parratt, there was no contention that the alleged



deprivation of petitioner's asserted property right was anything other than an isolated instance, or that it resulted from respondent NYCERS' practice or custom (A8, n. 4). Indeed, the Court recognized that no pre-deprivation hearing was needed or could have taken place (A7). Nor was it necessary that a hearing take place at the administrative level (A7). However, in an Article 78 proceeding, the state court was empowered to consider whether an administrative determination was made in violation of lawful procedure or was affected by an error of law, and, upon a showing of a lack of appropriate procedure, could order the agency to conduct a proper hearing (A9-10).

Thus, had petitioner timely sought Article 78 review, the state court would have had the authority to remand to NYCERS for



an appropriate proceeding (A11). The availability of such Article 78 review did not constitute a state remedy to be exhausted, but rather was a part of the procedures available under state law which satisfied the requirements of procedural due process (A14). Article 78 provided petitioner a due process hearing at a meaningful time and in a meaningful manner, and accordingly, petitioner failed to state a claim of denial of procedural due process (A7, A13).

Upon petitioner's application for a rehearing, the petition was denied, but the panel entered an order amending the opinion to add a footnote stating that petitioner's claim did not involve the possibility of any remedy in a proceeding pursuant to 42 U.S.C. § 1983 which is unavailable in a proceeding in a New York state court,



distinguishing Davidson v. Capuano, 792 F.2d 275 (2d Cir. 1986) and Petrella v. Siegel, 843 F.2d 87 (2d Cir., 1988) (A15-15b).

REASONS FOR DENYING THE WRIT

THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY DETERMINED THAT THE ADMINISTRATIVE AND JUDICIAL PROCEDURES AVAILABLE TO PETITIONER PROVIDED ALL THE PROCESS DUE HER UNDER THE PRECEDENTS OF THIS COURT, INCLUDING PARRATT v. TAYLOR, 468 U.S. 517 (1984) AND MATHEWS v. ELDRIDGE, 424 U.S. 319 (1976). THERE IS NO BASIS HERE FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

(1)

In this case, petitioner seeks a hearing at which the central issue to be determined would be whether respondent NYCERS' received an election by her husband selecting an option providing for survivorship

benefits, rather than the payment of maximum benefits to him during his life without survivorship benefits as was selected by respondent NYCERS, which asserts that he defaulted in making any selection (A5, A42-43, CA9). While petitioner claims that it is the lack of a hearing which served to deprive her of her claimed property right, and that she is accordingly attacking NYCERS' established procedures (Petition, p. 16, fn.), in fact it is apparent that the deprivation occurred as a result of the respondents NYCERS' failure to receive any election, which petitioner apparently disputes.

NYCERS' procedures have been upheld by both the federal courts in the Second Circuit (see Basciano v. Herkimer, 605 F.2d 605 (2d Cir.,



1978), cert. den., 442 U.S. 929 (1979) (upholding procedures for determining eligibility for accident disability benefits) and the New York State Courts (see, e.g., Randolph v. NYCERS, 86 AD2d 536, 445 N.Y.S.2d 990 (1st Dept, 1982), affd. for reasons stated below, 56 NY2d 893, 453 N.Y.S.2d 430, 438 N.E.2d 1145 (1982) (application for transfer of pension credits not timely; NYCERS acted in full compliance with its procedures.) The deprivation here resulted not from NYCERS' procedures, but rather, as noted by the Court of Appeals, from an isolated instance for which no pre-deprivation hearing would be practicable (A8, n.). Whether judged under the Parratt analysis applied by the Court of Appeals, or the related



Mathews analysis applied by the District Court, petitioner has failed to make a claim of violation of procedural due process, and there is no reason to grant the requested writ of certiorari.

(2)

A necessary inquiry in any action pursuant to 42 U.S.C. §1983 is whether the plaintiff has been denied any right "secured by the Constitution and laws." Baker v. McCollan, 443 U.S. 137, 140 (1979). Here, where plaintiff's sole claim is that the defendants have deprived her of property in violation of the procedural protections of the Due Process Clause of the Fourteenth Amendment, plaintiff must show that she has suffered a deprivation "without due process of law." Parratt v.



Taylor, 451 U.S. 527, 537 (1981).² As

this Court has stated:

" '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484 (1971).

Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

Accordingly, as this Court stated in Parratt v. Taylor, supra, 451 U.S. at 539, where those acting under state law are faced with "either the necessity

² We will assume, as did the Courts below, that plaintiff's claim for survivorship benefits is a property interest protected by the Due Process Clause.

of quick action ... or the impracticability of providing any meaningful predeprivation process, ... the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking" may satisfy the requirements of procedural due process. Indeed, post-deprivation remedies will satisfy due process, even where the State's action is intentional, where pre-deprivation hearings are impractical. Hudson v. Palmer, 468 U.S. 517, 533 (1984).

In this instance, the Court of Appeals properly applied the principles of Parratt and Hudson. Like the loss of the hobby materials in Parratt, and the "shakedown" in Hudson v. Palmer, the deprivation here, resulting from the

respondent's alleged failure to process properly an option selection, could not be preceded by any meaningful hearing.

Likewise, the post-deprivation procedures afforded petitioner under the laws of New York are certainly adequate. In contrast to Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982), upon which petitioner relies, and in which there was no available judicial review of the commission's action, New York provides a summary procedure for the expeditious review of administrative action in the form of an Article 78 proceeding (A9). In such a proceeding, petitioner could have obtained a quick review of the administrative determination not to pay her survivorship benefits (A9-12). A

proceeding pursuant to Article 78 has been described as "part of the administrative procedure [provided]... to accommodate challenges to specific agency actions." Liotta v. Rent Guidelines Bd., Inc., 547 F. Supp. 800, 802 (S.D.N.Y., 1982). Such a procedure has been traditionally used and is well equipped for resolving the claims of members of New York's public pension plans and their beneficiaries. See, e.g., Guzman v. NYCERS, 45 NY2d 186, 408 N.Y.S.2d 59, 379 N.E.2d 1189 (1978) (Mailing of check to beneficiary did not constitute "first payment" so as to cut off entitlement to death benefit); O'Connor v. NYCERS, 42 AD2d 70, 345 N.Y.S.2d 33 (1973) (Constructive receipt of check by member cut off beneficiary's right to



death benefit). New York's courts are experienced in resolving issues relating to the selection of pension benefits. See, Ortelere v. Teachers' Retirement Board, 25 NY2d 196, 303 N.Y.S.2d 362, 250 N.E.2d 460 (1969) (The Court found that plaintiff had established a cause of action for revocation of election of benefits on the ground employee was mentally ill when the disputed election was made); Weinberg v. NYCERS, 71 AD2d 672, 418 N.Y.S.2d 950 (2d Dept., 1979), affd. for reasons stated below, 50 NY2d 970, 431 N.Y.S.2d 529, 409 N.E.2d 1001 (1980) (Member's attempt to change pension plan ineffective after statutory period).

Petitioner's factual claim that her husband selected an option other than



that under which her husband was paid for a number of years is the kind of factual dispute properly resolved in New York's courts through an Article 78 proceeding. Under these circumstances, it cannot be said that the State has "refuse[d] to provide a suitable post-deprivation remedy." Hudson v. Palmer, supra, 468 U.S. at 533.

Petitioner claims, however, that the Court of Appeals misapplied Parratt in that there is no showing that a pre-deprivation hearing was impractical. Petition, pp. 13-15. However, as we stated above, and as the Court of Appeals held, the deprivation resulted from an isolated instance, and was not the result of any policy or custom (A8-9, fn.). It was NYCERS' alleged

loss of an option selection form, not the failure to grant a hearing, which caused the claimed deprivation. As in Parratt and Hudson, the loss here "is not the result of some established procedure" (Parratt v. Taylor, supra, 451 U.S. at 541); it is the result of her husband's failure to make an option selection or NYCERS' loss of the form. For this reason, petitioner's citation to the opinions of Court of Appeals' decisions in other Circuits for the proposition that Parratt is inapplicable to situations where the deprivation occurs as the result of state policy or established state procedures is irrelevant. See, e.g., Cuellar v. Texas Employment Comm., 825 F.2d 930, 936 (5th Cir. 1987) (Parratt not applicable to alleged deficiencies in



established procedures at
state-authorized hearing on
disqualification for employment
benefits); Fetner v. City of Roanoke,
813 F.2d 1183 (11th Cir., 1987).
(Parratt inapplicable where plaintiff
fired, without a hearing, by City
Council, City's highest governing
body). The statements in these and
other opinions cited by the petitioner to
the effect that Parratt is limited to
random actions by non-policy making
employees in no way undercuts the
holding here of the Second Circuit
Court of Appeals or supports review.

(3)

Additional considerations counsel
against review by this Court. In her
amended complaint, petitioner alleged
that her family was "never apprised of



the fact that their application had been misplaced and/or lost by NYCERS, or that a further notice had allegedly been sent by NYCERS" (CA 8). Although the District Court accepted petitioner's subsequent assertion that her federal claim was not based on negligence (A23), we believe that such a claim goes to the heart of her case; she is seeking a hearing to establish that her husband did forward an election to respondent, and unless petitioner believes respondents' agents to be committing some fraud, her theory must be that respondent NYCERS' employees misplaced the election. Such claim of negligence does not make out a 42 U.S.C. §1983 claim founded on a violation of due process. Daniels v. Williams, 474 U.S. 327 (1986).



Accordingly, this case does not present an appropriate vehicle for consideration of the breadth and meaning of the Parratt and Hudson decisions.

Furthermore, even assuming that Parratt were inapplicable here, review is inappropriate because dismissal of the complaint was proper under the analysis set forth in Mathews v. Eldridge, supra, 424 U.S. 319 (1976). As found by the District Court, application of the three part analysis of Mathews shows that NYCERS' procedures satisfy due process. First, the private interest does not implicate "the very means by which to live" (Goldberg v. Kelly, 397 U.S. 254, 264 [1970]); thus no pre-deprivation hearing is necessary (A28). Second, NYCERS' procedures do not create any but the most minimal



risk of erroneous deprivation; petitioner's factual claim revolves around documentary evidence, and an administrative hearing would thus be of minimal value (A30). The speedy relief available in an Article 78 proceeding (A31-32) also helps to protect against any erroneous determination. Finally, balancing the dubious benefit of an administrative hearing to resolution of petitioner's claim against the burden to respondents of providing a hearing to members and beneficiaries mandates against the provision of such a hearing (A31).

(4)

Petitioner urges that there is a conflict in the decisions of the Court of Appeals for the Second Circuit. Petition, pp. 16-18. Even where such



a conflict exists, we believe it to be an insufficient basis for review by this Court. In any event, there is no such conflict. In Petrella v. Siegel, 843 F.2d 87 (2d Cir. 1988) the plaintiff, a former school district superintendent, alleged that he had been terminated wrongfully, without a hearing, and the district school board argued, not that he could be terminated without a hearing, but that in fact he had resigned. 843 F.2d at 90. The plaintiff urged that his resignation had been manufactured by the board to avoid holding a hearing before termination. Id., p. 89. Under those circumstances, the Court held he was entitled to a hearing.

Thus, Petrella involved an alleged termination of an employee with a



property right to his position, a situation involving different interests than those here. See, Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 542-546 (1985). The Court of Appeals did not even cite Parratt, and its discussion of state court remedies concerned the possibly limited nature of the remedies available to that plaintiff in a state court proceeding, 843 F.2d at 90, which, as the panel in this case stated, is not an issue here (A15a-b). Petrella provides no basis for further review.



CONCLUSION

**THE PETITION FOR A WRIT
OF CERTIORARI SHOULD BE
DENIED.**

September 9, 1988

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